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No. 617

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER, and ALVIN J. DELAIRE, a copartnership doing business as Gruss & Co.,

Appellants,

v.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY TO MOTION TO AFFIRM

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I.

On remand the District Court erroneously reinstated its determination, reversed by this Court on the first appeal, that the preferred stock order should be set aside for failure to approve Alleghany's control of Central.

Ignoring or misconceiving the exhaustive proceedings culminating in this Court's decision of the earlier appeal, the appellees persistently distort that decision by describing it as a mere "affirmance of the ICC [status, not preferred stock] order dated May 24, 1955, assuming jurisdic-

tion over Alleghany pursuant to § 5(3)" (Motion to Affirm, pp. 2, 24, 25, 26). The obvious, but important, correction is that this Court in fact announced no such partial and artificial "affirmance" of the ICC, but reversed the District Court's judgment. That judgment had set aside both the status and the preferred stock orders upon the clearly stated ground, *inter alia*, that ICC had not approved Alleghany's acquisition of control over Central. 138 F. Supp. at 128, 131-2, 136.

The difference is crucial. The correction refutes the effort to show that the District Court remained free to reinstate its earlier, and reversed, theory that the ICC's stock orders were void because Alleghany's acquisition of control over Central had not been approved.

As these and the other appellants have stressed in their statements as to jurisdiction, this Court held on the first appeal that it was unnecesary to decide whether the ICC was required to approve Alleghany's acquisition of control over Central. 353 U. S. at 151-152. That express ruling, we have urged, unmistakably removed that issue from the case, excluding it from the "claim, not previously discussed" (*id.*, at 175), the only thing left open on the remand. Because this point is decisive, and because we think the account of the earlier proceedings in the Motion to Affirm is both plainly erroneous and potentially confusing, we undertake briefly to erase the doubts appellees suggest.*

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* Possibly confusing, too, is appellees' suggestion (Motion to Affirm, p. 7) that the decision below on remand "left the door open to a regularization by Alleghany of its position if it would merely file an application under § 5(2)" for approval of its control over Central. If this implies a possibility of quickly terminating this matter by the suggested application, it is misleading. As shown by the quotation from the District Court's opinion in footnote 7, p. 5, of the Motion to Affirm, the lower court would require not only a § 5(2) application but also a resubmission of the exchange plan to the stockholders. In other words, the decision below would set at naught the protracted and costly proceedings up to this point. At every step, moreover, it would invite a repetition of review proceedings by the appellees resulting in still further extended delays.

1. There is, of course, no doubt that the ICC's stock order as well as the jurisdiction-assuming order were before the District Court and this Court on the prior appeal. Indeed, both courts agreed that it was only the stock order which gave the appellees standing in this litigation. See 138 F. Supp. at 131-132; 353 U. S. at 160, 174, 175.

2. The District Court had set aside both the stock and status orders. 138 F. Supp. at 132-133. It had, with perfect clarity, stated alternative holdings based on its conclusion that Alleghany's control over Central required ICC approval. Anticipating the possibility that this Court might disagree with its holding on jurisdiction, and undertaking to avoid piecemeal disposition of the case, the District Court had held both

> (a) that the absence of such approval was a fatal defect in ICC's jurisdiction (*id.*, at 128, 132, 136); and
>
> (b) alternatively, and critically for present purposes, that, if it was wrong on the jurisdictional point, its nullification of both ICC orders should stand pending the agency's determination whether Alleghany's control over Central was in the public interest (*id.*, at 136).

3. When this Court reversed, it rejected both alternative holdings of the District Court. This Court held it unnecessary to resolve the control question in this case and limited the function of the District Court on remand to determining the questions on which appellants have now prevailed below. Both of the District Court's earlier alternative holdings fell with that decision.

To hold that the second ground remained eligible for revival is to hold that this Court, after squarely addressing itself to the point, invited this inevitable second appearance. Apparently recognizing the absurdity of such a conclusion, the appellees seek vainly to escape it with their description of this Court's action as an "affirmance" of the ICC's status order—with the stock order relegated to "another

proceeding''—rather than a reversal of the District Court's nullification of both orders.

4. As if to emphasize the character of this repeat performance, the appellees open their argument with what is largely a shortened but still substantial duplicate of their contention on the first appeal that Alleghany's control over Central required ICC approval. Compare the present Motion to Affirm, pp. 8-16, with the Brief for Appellees in No. 36, Oct. T. 1956, pp. 61-83. In their brief on the first appeal (p. 83), correctly describing and seeking to sustain the District Court's action, the appellees claimed that the absence of such ICC approval ''justified the District Court's annulment of the status *and preferred stock orders*'' (emphasis added). That argument was rejected *in toto* as irrelevant. To hold summarily now that the District Court erred in declaring it relevant again is not ''to deprive appellees of their day in this Court and in the lower Court on this claim'' (Motion to Affirm, p. 26). It is only to shorten finally this repetitive second ''day'' in a litigation which imposes a mounting and undenied burden upon the preferred stockholders.*

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* In addition to the points summarized above, there is an independently sufficient answer to the District Court's decision in section 20a(11) of the Interstate Commerce Act, which provides that ''no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor [by the ICC under this section] * * * shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.'' The plain purpose of this provision, part of the immanent scheme of administrative finality throughout 20a, was to make an ICC authorization a definitive basis upon which investors could rely. In a lame effort to escape this conclusion, the appellees suggest (Motion to Affirm, p. A 6) that the reference is ''to a 'failure' by the issuer and not to a failure by the ICC to make a valid order.'' But it would be absurd to conclude that Congress intended to protect issuers against *their own defaults* while leaving them (and the whole financial community) exposed to a voiding of their securities on account of some omission by the ICC.

II.

The asserted "shortage" of Alleghany assets presents only a frivolous quarrel with the ICC on a matter confided to that agency's expert judgment.

While appellees correctly state that the District Court "did not discuss" this remaining contention (Motion to Affirm, p. 30), it was presented to that Court in language substantially the same as that of Point III of the present Motion to Affirm. It is fairly to be included, we submit with the lengthy, trivial, frequently inconsistent business and economic theories which the appellees advanced and the District Court properly dismissed on the ground (Appendix A to our Statement as to Jurisdiction, p. 24)—

> "that the facts disclosed to the Commission and available as matters of public knowledge were enough to put an expert body on notice of all the alleged undesirable qualities of the issue; that the questions so raised were within the range of expert judgment reserved to the Commission; that its findings thereon satisfy the statute; and that we may not substitute our views for those it expressed."

That conclusion is fully applicable to, and dispositive of, the appellees' proposed alternative ground for affirmance, which does not merit the time of this Court for further briefs and argument.

On its merits, the appellees' claim of an asset "shortage"—based upon a comparison of market value of Alleghany's assets with market value of Alleghany's securities at the time of the ICC orders—is pointless. As shown by the very ICC decisions appellees cite, the only relevant comparison in determining whether there is over-capitalization would be between assets and *par value or stated value* (not market value) of the outstanding securities. *Chesa-*

peake & Ohio R. Co. Stock, 254 ICC 653; *Commercial Motor Freight Inc.*, 10 Fed. Carrier Cases. ¶33,089.*

The flimsiness of appellees' different view is highlighted by the sharp inconsistencies in their position:

> (1) They contended at length in the District Court that the conversion ratio was wrong because it was based upon a price of 8¾ for Alleghany common stock, the market price on the date which the ICC set to fix the ratio. The figure should have been higher than 8¾, they argued, to make the conversion rights of the new preferred less valuable. Appellees make no effort to square this rejection of market price where it was plainly appropriate with their insistence on referring to this price where it has no legitimate bearing. Nor do they mention that the low price of the common today leaves the holders of the new preferred, whose investment has been frozen by this litigation for over two years, with conversion rights of which the value now approaches zero.
>
> (2) Instead, appellees merely charge that the ICC was wrong because the market prices of Alleghany and Central securities, like others in general and railroad prices in particular, have declined sharply in recent months.** But this only illustrates the

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* Thus, in the *Chesapeake & Ohio* case, while it concluded that the proposed issue there in question should not be authorized (254 ICC at 659), the ICC made its computations on the basis of the $25 *par value* of the applicant's common stock although the market price of this stock was almost double this amount (47⅞) at the time (*id.* at 654, 658). See, similarly, *Commercial Motor Freight, supra*, 10 Fed. Carrier Cases at p. 431, where a proposed issue was approved because it left capitalizable assets of a value "in excess of the par amount of the proposed issue of stock."

** In other words, having chided the ICC in the earlier stages of this litigation for failing to predict that the market would rise, the appellees blandly complain now that the agency did not foresee the recent fall.

plain fact that market comparisons like the ones appellees suggest are shifting and unreliable bases for judgment. Not a syllable in Section 20a requires the ICC to employ such criteria. Rather, the sweeping authority granted by this provision makes appropriate here this Court's conclusion as to a more restricted area of administrative (SEC) authority—that "[t]he informed judgment of the Commission rather than that of the market, has been designated by the Act as the appropriate guide * * *." *Niagara Hudson Corp.* v. *Leventritt*, 340 U. S. 336, 346-347; and see *In re New England Public Service Co.*, 94 F. Supp. 343, 348 (D. Me.).

Even if appellees' "shortage" theory were a more arguable one as a matter of financial judgment, it would supply no basis for further consideration—and certainly none for affirmance—by this Court. As under Section 5 of the Interstate Commerce Act, the "exclusive and plenary" authority of the ICC under Section 20a* includes an extremely broad range of judgment and discretion. On familiar principles, the Commission's rejection of appellees' theory was well within that range. Cf. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87-88; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145-146.

Conclusion

For the reasons outlined above and in the statements as to jurisdiction, it is respectfully submitted that there is no ground for affirmance and ample basis for summary reversal of the decision below, so that the paralysis this

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* The quoted words are from § 20a(7); cf. § 5(11); and see § 20a(11), p. 4, fn., *supra*.

case has effected for over two years may finally end and the preferred shareholders be freed to employ and protect their investments.

Respectfully submitted,

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